No. 14656

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HANS FORSTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney
Attorney for Appellee

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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BRIEF OF APPELLEE

QUESTIONS PRESENTED

1. Whether the instructions given by the court adequately protected the rights of the defendant.

2. Whether the defendant, a man of many enterprises, can personally divert many thousands of dollars of unrecorded income into his personal savings

account and assert that the responsibility for admitted understatement of income is due to the incompetence of his bookkeeper and accountant.

3. Whether a defendant can pay personal bills of $107,780.36 from his business account and have the same charged as deductions under various business headings and escape responsibility.

4. Whether the refusal of the court in a lengthy trial to permit rebuttal of remote and collateral matters is prejudicial to the defendant.

5. Whether reference to the activities of a lawyer on behalf of the appellant who, at one time was an attorney for a co-defendant, constitutes prejudicial error.

COUNTER STATEMENT OF THE CASE

The Government believes a counter statement of the case is advisable.

Hans Forster, an astute business man, builded from the depression enterprises comprised of eight companies which had a sales volume of over eight million dollars yearly, which he sold for $2,600,000, exclusive of inventory. During these times he had the daily services of co-defendant Erickson, a bookeeper who kept the journals of two of the companies at Issaquah,

Washington, and monthly data were delivered to co-defendant Taylor, who kept general ledgers at Seattle.

Taylor became involved in personal tax evasion difficulties and, as a result, an investigation was commenced of Forster's personal income tax returns and the returns of Issaquah Creamery Company. This investigation disclosed an admitted understatement of hundreds of thousands of dollars of income and that much of this understatement arose because income was not recorded on the books of the company but was deposited in Forster's personal savings account at Issaquah.

Forster's accountants, after an audit could not estimate the tax due to the Government but it was generally agreed to be in excess of $1,000,000. It also developed that Forster paid many thousands of dollars of personal expenses by checks signed by him which Erickson recorded on the books under deceptive deductible items. Thereafter, Forster, Taylor and Erickson were indicted for the evasion of Forster's taxes individually and for the Issaquah Creamery Company during the years 1945 through 1949.

The Government in its proof presented evidence from several companies Forster controlled to prove the unrecorded income and the method by which it was done. The Court during the trial permitted lengthy

examination by counsel for each defendant on the bookkeeping procedures of the related companies. Several collateral matters of bookkeeping were inquired into generally over the Government's protest.

Prior to the instant case George Kachlein, an attorney, who had represented Taylor in his tax evasion difficulties, entered an appearance as counsel for Forster and before the trial Taylor moved for a severance because of alleged conflict of interest, which was opposed by the Government and counsel for Forster and denied by the Court. From the opening of the trial the claimed dual representation by Kachlein was referred to over Government objection. The defense of Forster was unique. It was admitted by his counsel that very substantial income was understated and that substantial taxes were due the Government. He admitted receiving the income and admitted payment of his personal bills with company checks. His explanation of his failure to report was that he expected Erickson to properly make the charges and expected Taylor to have knowledge of unrecorded income received at Issaquah.

Erickson admitted receiving income at Issaquah which he did not record on the books and which he gave to Forster. He admitted entries on the books under deceptive business deduction expense items.

Forster admitted that the unrecorded income went into a personal savings account in a bank at Issaquah. Taylor claimed he was ignorant of these matters. One thing all of the defendants agreed on was that in 1950 a meeting was held at Issaquah and Forster questioned and complained that the 1949 income was too much. Thereafter the evidence is in dispute, as to how it was done, but the income of Issaquah Creamery Company was arbitrarily reduced $51,578.76. Forster claimed Taylor did it. Taylor blamed Forster and Erickson. Forster and Erickson shifted the responsibility, but it was not disputed that it occurred.

The record is full of protestations of good faith and contradiction and each defendant blamed the other and attempted to exculpate himself. Erickson received a modest salary for his services and Taylor a nominal fee for his work. Forster was the only beneficiary of the understatement of income and evasion of taxes.

After the jury was instructed they asked and received a supplemental instruction from the court and ten hours later returned a verdict convicting Forster on all counts and acquitting Taylor and Erickson. It is not the appellee's position that the evidence was insufficient to convict Taylor and Erickson but that the jury failed to convict them for reasons sufficient to themselves.

SUMMARY OF THE ARGUMENT

1. The evidence clearly shows that Forster independently of his bookkeeper and accountant cleverly diverted unrecorded income and used deceptive items to conceal his evasion.

2. The instructions given by the court adequately define the issues and emphasize the essential elements of the charge, including specific wrongful intent.

3. The supplemental instruction given by the court did not prejudice the appellant.

4. The instruction of the Kachlein-Taylor relationship was invited by the appellant's counsel and was used by the appellant throughout the trial to attempt to escape responsibility for his own activities.

5. The trial court was correct in its rulings in excluding rebuttal of collateral matters brought out in cross examination, which were immaterial and had no bearing on the substantive issues of the case.

The Government submits that Forster's own admissions are more than sufficient to establish his guilt beyond a reasonable doubt and any questioned instruction or ruling was at most harmless.

EVIDENCE OF FORSTER EVASION

The appellant's brief skillfully avoids discussion of Forster's personal activities in income diversion. It is argued that a millionaire businessman left everything to Taylor and Erickson and kept no books of account. No one who can read or write should advance such a theory and expect to be believed. We can for this purpose eliminate Taylor and his unusual bookkeeping which only benefited Forster and examine the record. It shows thousands of dollars which were received in Issaquah by Forster and UNRECORDED and deposited in Account 198 (Ex. 55, Hans Forster's personal savings account). It also shows thousands of dollars of personal expenses, including a Cadillac automobile, a sailboat, his daughter's wedding reception, his Swiss Military Tax, charged under deceptive business items such as plant expense, truck expense, supplies, advertising, etc.

Ira Eppler, a revenue agent, testified in detail as to the amount of unrecorded income which went into Account 198 (R. 147-349), and the stipulation of counsel for the appellant (Ex. 238) admits that these sums, $107,780.86, (R. 1768) were unrecorded and were deposited in the bank in Account 198, the personal account of Forster, and one deposit in 1945 of $49,552.82 (Ex. 53) contained $850 in currency

(R. 158). $17,100 of Simonson and Forster checks were deposited therein. Renton Ice and Ice Cream Company's checks made payable to Issaquah Creamery Company were brought to Forster by employees, who stated they had no place on the books for them and left them in Forster's desk, and sales slips were thrown away by Forster (R. 174-180). Milk equalization checks for $23,030.92, payable to the Issaquah Creamery Company, were deposited in this personal savings account (R. 176, R. 267-268). Forster admitted that the Time Oil Company cash rebates had not been reported in his tax returns (R. 208-211). Some $24,000 of Daisy Ice Cream Company checks went into Forster's personal account 198 (R. 274).

On Forster's personal expenses Eppler testified that the training of hunting dogs was charged as miscellaneous expense (R. 216-217); personal traveler's checks, personal clothing, television set, jewelry, and Lightning Sailboat charged to supplies (R. 222-226, 302); a Cadillac for Mrs. Forster charged to truck expense (R. 227); $1695.92 wedding reception for daughter charged to advertising (R. 227-228); cash for personal use charged to plant expense (R. 229); checks to Swiss Legation for Military Tax charged to plant and advertising (R. 231-233, 240-241); checks to Merrill, Lynch, Pierce, Fenner and Beane (R. 229)

charged to plant expense. Personal expenses between 1945 and 1949 came to a total of $48,509.75 and were used as deductions on the returns (R.234-239). A check for $5,744.44 to Puget Sound Products (Ex. 64) listed on the books as butter purchases and deposited in Account 198 was admitted by Forster as not for butter (R. 247). $18,305 of currency was deposited in 1945, some of which was Time Oil Company rebates and farm rental income (R. 248). Forster carried his children on the pay roll while abroad and at finishing school (R. 311). Butter sales were not recorded on the books (R. 324).

It is to be noted the bookkeeper at Issaquah did not ask Taylor's advice about business deduction items (R. 331). The cross examination by appellant's counsel was extended and co-defendant Erickson even identified a list of unrecorded personal items (R. 278). Examination of income tax returns did not show individual items of sales omitted. It is to be noted that a national firm of accountants estimated the tax due by Forster and his company amounted to $1,375,000 (R. 261).

The above reference to the record is only a part of the diversion by Forster of income at Issaquah without any help from Taylor. Exhibit 238, which is

a stipulation of checks received at Issaquah and payable to the Issaquah Creamery Company which were deposited in Forster's personal savings account and unreported and unrecorded, should be examined. It contains 283 items ranging in amounts from $2.22 to $10,742.40. Counsel for the appellant in his stipulation and by his statements in court throughout the trial referred to it for the purpose of showing Forster's cooperation with the Government, but this did not explain the evasions. Exhibit 55 is a damaging piece of evidence against Forster. It is Account 198 in the Washington State Bank at Issaquah. Into it went the diverted receipts of cash and checks and Taylor had nothing to do with this account and yet it shows a balance of $21,605.83 on January 6, 1944, and throughout the period of the indictment increased to $129,802.95 as of September 22, 1948, although substantial withdrawals occurred in the interim, and on December 31, 1949, it had a balance of $91,806.70 although there had been withdrawals of approximately $70,000 during the year (R. 1137-1138).

Forster admitted that he could figure profits (R. 1153, 1159). It is unbelievable that an astute business man could with innocence make these collections and claim innocence when he was personally diverting the checks. Another strong point against Forster's claimed ignorance is the recital of the Janu-

ary 1950 meeting concerning the 1949 profits of the Issaquah Creamery Company. All of the defendants, including Forster, agreed that Forster had complained about the profits (R. 965, 1006). Taylor's account of the matter is found in the following portions of the record: R. 1553-1561, 1820-1833, 2162-2176, 2368-2370. Forster's version is found in the record at 1318-1323.

Forster admitted that Erickson, who was a co-defendant and whose testimony is not in the record, was the office manager and had charge of the book-keeping at Issaquah (R. 1229-1233).

We might observe here that Taylor, the accountant, was receiving an income of about $5,000 for accounting services for eight companies, or an average of $50 per month per company, and that Erickson's salary varied from $2700 in 1945 to $5400 in 1949 (R. 692-693). Income taxes were not their financial concern. It did vitally concern Forster. He had to pay it. All agreed that the 1949 books were altered in sums varying from $50,000 to $80,000, and taxes were paid on the lower figure.

Government Exhibit 280 shows that for that year Issaquah Creamery Company reported on its return $49,725.48 when it should have reported $204,313.47. Who got the benefit?

Exhibit 279 demonstrates conclusively the evasion of unreported income and a shortage of taxes as follows:

For 1945	$18,320.90
For 1946	$69,577.71
For 1947	$52,886.66
For 1948	$59,727.83
For 1949	$53,850.57

The defendant's financial statements show interesting figures. Exhibit 124, over the appellant's signature, shows an increase in assets of $200,000 in 1947. In fact, Exhibits 121 to 130 are financial data which explode the protest of Forster's claimed ignorance (R. 1006-1012).

We hold no brief for Taylor or for Erickson because we think the record shows they actively participated in the evasion, and we also earnestly suggest that Taylor's statement in 1950 about the changes made in the 1949 books, "I will change my ledger accordingly, and you and Harold [meaning Erickson] will have to substantiate the changes that are made" has a ring of verity (R. 1561). Forster's statement that Taylor and he never discussed income tax is unbelievable (R. 1100).

Exhibit 279 shows that over $9,000 cash of Time Oil Company payments were received by Forster for which monthly receipts (Ex. 172-173) were issued,

and it was stipulated by counsel as having been received by Forster or his employees (R. 106-109). Forster discusses this cash agreement and attempts to explain it (R. 935-937).

Forster's claimed ignorance received a setback from one of his longtime employees. Caroline Neukirchen, a reluctant witness, employed by Forster since 1933 and who maintaned the Accounts Receivable, testified that she received instructions directly from Forster not to record items (R. 111, 125-127) and was ordered by Forster to put them in his desk (R. 128-131) and did not include them in the company's deposit slips (R. 132-136). On cross examination it was stipulated that the checks went into Forster's savings account and the books did not show any of the omissions (R. 146-147). It is interesting to note that Miss Neukirchen once objected to Forster and his reply to her, quoted in part, gives the key to his desire to evade and defraud:

> "A. He told me that I was not doing anything wrong; and that he asked me, 'Are you withholding money from me?'; and I said, 'No, I wasn't withholding any money.'; and he said, 'Well, you are not doing anything wrong then."; * * *" (R. 143)

The recital of Forster's participation in the Renton Ice and Ice Cream Company's manipulation of checks and salaries of Schneider and Mazie Basket [a widow who is now married to Lovinger and will be

referred to as Basket] should be sufficient in itself to establish Forster's guilt. Forster was a stockholder in the company and had arranged for its purchase. He had no salary account on the books and yet he received income from the other stockholders, by having its two officers endorse a part of their salary checks to him, on which they paid income tax and which he did not report (R. 2725-2763).

In order to perfect the system and to make discovery more difficult, bank cashier's checks in substantial amounts up to $7710 were issued at a bank (Ex. 77) and mailed to Forster at Issaquah (R. 2736-2737). The checks showed salaries of $6,000 a year to each of these parties (R. 2738-2746) although Forster received a substatial portion of them. Basket, a widow, who was working for the company, was paid $170 per month salary and her testimony confirms Schneider, the other officer, in the method used to channel funds to Forster. An examination of Exhibits 203, 204, 206, 207, and 208 is an interesting example of a plan cleverly conceived, deliberately executed for the sole object of tax evasion which finally resulted in failure.

How can there be a sincere claim that the defense was based upon complete reliance on the bookkeeping and accounting be asserted? Nowhere was it shown

that Taylor had anything except knowledge of the diversions at Issaquah and the payment of thousands of dollars of personal expenses under deceptive recordings. In fact, the record abundantly reveals Forster and Erickson's participation, which may or may not have been known to Taylor, but resulted in a skillful evasion of taxes.

THE INSTRUCTIONS

The appellant found no fault with the Court's original instructions which clearly and definitely made willful evasion an essential element of the charge. A portion of the court's charge is set forth on page 16 of appellant's brief. There was no objection to these instructions except the use of the words "reckless disregard." In fact, counsel for the appellant in his exception to the supplemental instruction stated in referring to it "* * * except for the use of the words 'reckless disregard' was a full and complete instruction in that particular as I view it." (R. 2676)

The court gave a clear and complete definition of reasonable doubt and required the Government to prove "every essential element" (R. 2648) and again cautioned the jury: "If you find him innocent, say so. Remember at all times that a defendant must be acquitted if any reasonable doubt remains in your minds." (R. 2650)

The court fully defined the three essential elements (R. 2655), and then again states: "On the other hand, if you have any reasonable doubt as to any one of these three elements you should acquit the partiular defendant concerned as to such count" (R. 2657). And on the same page the court stated: "What consideration you are to give the evidence as to these items in connection with the remaining two essential elements, namely, each defendant's knowledge that substantial tax was owing, and whether there existed a willful attempt on the part of any or all of the defendants to evade any of it, is a matter left exclusively and entirely to your determination." (R. 2657)

The court warned against imputed crime to a defendant because of the acts of another and required knowledge of the return and the falsity thereof and the filing with intent to evade tax (R. 2662).

The court stated that good faith was a complete defense and cautioned about bona fide mistakes and required a specific wrongful intent "as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable" (R. 2662-2663), and then cautioned, "Likewise, NEGLIGENCE or CARELESSNESS in handling books of account, in providing information to be used in preparing income tax returns, or in handling busi-

ness affairs is not equivalent to fraud with intent to evade tax." (Our emphasis) (R. 2663).

Again the court cautioned: "It is not necessary to prove that the tax due was actually evaded but it is necessary to prove that there was a WILLFUL and POSITIVE ATTEMPT TO EVADE THE TAX in any manner or to defeat it by any means." (Our emphasis) (R. 2661).

These instructions cover thirty pages of the printed record. Evasion was referred to twenty-one times, and the court cautioned about willfulness sixteen times and mentioned knowledge and intent forty times. From this repetition it must be apparent that there was no doubt the jury had the issues clearly defined. The defendants are always entitled to fair instructions and such were given, and any questioned wording is surrounded by clear and positive language requiring SPECIFIC INTENT TO EVADE AS AN ESSENTIAL ELEMENT. No court is required to conform to a fixed formula of wording, nor is a defendant entitled to lift out of context isolated paragraphs of a charge as the basis of error.

A review of the instructions makes it difficult to visualize how the court could have more clearly made willfulness an essential element in the crime of tax evasion. The instructions should be considered as a whole, because set forth therein the element of will-

fulness is inextricably entwined with specific intent to evade known taxes, and an isolated paragraph could not affect them.

We cite a recent case, yet unreported, decided by the Sixth Circuit December 22, 1955, in which it was said:

> "The court's instructions with respect to this testimony contained no incorrect statement of law or fact; it is objected to only because it denominated appellant's conduct, if Bruns were believed, as 'wrongful and criminal,' and might, therefore, in effect, cause the jury to find appellant guilty of a crime for which she had not been indicted. Viewed against the context of the instructions as a whole, we think that the court's language could not have misled the jury in the respect charged." *Cottingham v. U. S.*, 54 U.S.T.C. 338.

ADDITIONAL OR SUPPLEMENTAL INSTRUCTIONS

The appellant assumes that before the supplemental instruction was given it was obvious that the jury at that time had not agreed on a verdict as to any of the defendants, and assumes that the instruction resulted in a conviction of the appellant. If one were able to go outside the record, the answer to that fact would be otherwise. There were three defendants and ten hours after the supplemental instruction, the jury returned a verdict acquitting defendants Erickson and Taylor. The jury had been deliberating when

they asked for the supplemental instruction. They did not ask that complete instructions be read but confined themselves to a single request. The court complied. If the jury desired "good faith" or "mistake" instructions, it can be assumed it would have requested them in the supplemental instructions. The lower court referred to the previous instruction that the acts charged in the Indictment were alleged to have been done willfully and knowingly and that those acts to be actionable must have been done voluntarily and purposely and with a specific intent to do what the law forbids with bad faith and an evil motive (R. 2674). By specific reference, therefore, the court advised concerning the test of intent necessary to support conviction of the crimes charged, not of some unrelated or unmentioned crime. Similarly, all references concerning specific intent, knowledge of and purpose to violate the law, reckless disregard of the law, and willfulness as used in a criminal statute can be considered to refer only to the criminal statute or the law which the jury had been advised applied to this case. It is an extremely far-fetched argument to suggest that the failure to repeat *ad infinitum* the identity of the statute involved and the nature of the crime under consideration is error.

Bollenbach v. U. S., 326 U. S. 607, relied on by the appellant, does not give support. In that case the

jury reported it was "hopelessly deadlocked." One juror asked a vital question which the court failed to answer, and the jury returned again in twenty minutes for further instructions. Defense counsel then objected to the court's failure to answer. The court refused other defense requests and gave an equivocal instruction, and five minutes later the jury returned the verdict. The decision of reversal was not unanimous, but the quick time element of the verdict apparently influenced the decision.

The cases cited by the appellant as following the *Bollenbach* decision are not on the supplemental instruction phase but on equivocal instructions and will not further be discussed.

"KACHLEIN AFFAIR"

We might well quote Judge Lemmon's observation in *Mitchell v. U. S.*, 213 F. 2d 951-953 as an answer to this claimed error:

> "It is familiar technique for an appellant to seize upon every peccadillo committed by the lower court and magnify it until it becomes a blunder of major proportions."

This is demonstrated on pages 70-71 of the appellant's brief where the words "conspiracy" and "framed" are recklessly used. In his opening statement counsel for Taylor said he would submit

"a series of circumstances which I would like now to summarize for you" (R. 87), and he did — and all the things he stated, he proved — and the record itself abundantly shows and the appellant's brief confirms that Forster tried to make Taylor the scapegoat for his derelictions, and still does.

Each of the eight points referred to in the appellant's brief (P. 70-90) was established by proof. As a matter of fact there was little disagreement as to what had occurred. A difference arose as to the construction to be placed upon such activities. The Government in the preparation of the case concluded that all three defendants had worked in unison and were each guilty of the attempted evasion and that they all should be tried together because separate trials would result in confusion of issues and attempts to shift culpability.

On January 6, 1954, three weeks before the trial of the case, co-defendant Taylor moved for severance and supported it by affidavit in which he recited that, in a trial with Forster and Erickson, the proof would show a strong case against them. Forster had inserted in the newspapers various statements emphasizing Taylor's personal plea of guilty to income tax evasion and his troubles resulted from his alliance with Taylor. Taylor in his affidavit referred to an

"artful campaign" by Erickson and Forster "to fix upon him responsibility for their own acts." (R. 10-15)

At that time George Kachlein, who had been the attorney for Taylor in his personal tax difficulties, knew that the defenses of Forster and Taylor were to be hostile. In this setting, counsel for the appellant stated to the court he opposed Taylor's motion for severance, and if the court intended favorably to consider it, he desired to be heard (R. 2788-2790). It would appear that Mr. Kachlein and all counsel for the appellant believed that the proof of Taylor's "sloppy bookkeeping" could be their defense. It is to be noted that after Kachlein withdrew as counsel he remained in attendance at the counsel table and testified as a witness on behalf of Forster. Kachlein was Taylor's attorney when he met with the agents on April 25, 1950, in connection with Forster's tax matters. He made the statement that if errors were made "it was undoubtedly due to the sloppy accounting work of Mr. Hicks Taylor" (R. 354-355). Kachlein knew of possible fraud action in August 1950 (R. 2516-2517). Forster employed Kachlein at the end of March 1950 (R. 1356). Kachlein and Forster went to Washington, D. C. about taxes (R. 1426), and Kachlein did not advise after April 25, 1950, that there was any conflict of interest (R. 1597-1598). Taylor's work sheets were in Forster's possession and Kachlein did not tell Taylor

he was delivering Taylor's work papers to the agents (R. 1614). During this period Taylor was in prison and thought Kachlein was representing him until October. Counsel for Forster stipulated in open court that Kachlein represented Taylor until October 27, 1950 (R. 1608).

There is a wide difference between representing parties in civil matters and finding a conflict of interest, and a much stricter standard is required when a criminal case involves two clients with conflicting interests, and more certainly when one becomes counsel for one of the defendants and a witness in his behalf.

The record shows that during the opening statement of Taylor's counsel, no objection was made to his remarks by appellant's counsel nor request made that it be restricted or disregarded. The court denied the motion for mistrial, and had for the protection of the defendants previously made an extended statement stressing that opening statements were not evidence of any kind (R. 92). The Government took the position from the beginning that these matters were immaterial, and the court instructed the jury that the matter was an issue between Taylor and Forster, and no part was introduced by the Government (R. 2437). Throughout, the Government objected to the introduction of such evidence (R. 2451,

2479-2481, 2498), and at the conclusion the Government moved to strike.

> "Mr. Moriarty: At this time the Government moves to strike the testimony of Mr. Kachlein as immaterial and irrelevant and under the position that the Government has taken we indulge in no cross examination."

Again:

> "The Court: The Government, in view of their position waives cross examination.
>
> "Mr. Moriarty: No interest in the controversy." (R. 2509)

The Government in its closing argument endeavored to clarify the matter when it was stated:

> "This Exhibit, A-142, was put into evidence during the side show about the Kachlein episode, in which we have at all times and do now disavow any connection with and have no part in, * * *" (R. 2642)

It is apparent here that the Forster defense wished Taylor in the case for their own purposes. They opposed the severance in the first instance and did not join Taylor's counsel during the other times when he urged it throughout the trial. They knew at the outset there was a conflict and while Taylor on October 25, 1950, had released Kachlein in civil matters to Forster, when the indictment was returned Kachlein knew that the defense of Forster had to be an attack on Taylor.

Kachlein could have withdrawn then, but for reasons of his own, remained. A dual interest was present in the civil matters between Taylor and Forster and it surely became a more delicate matter in the criminal proceedings.

By counsel's own action, he invited the situation. Taylor in this plight had no alternative but to present the facts, for what more powerful argument could have been made by Forster than that Taylor's own attorney had turned against him and in the criminal proceeding had espoused the cause of the co-defendand and was to be his witness.

There was no substantial conflict on the facts in the Kachlein affair and it was part of the picture. No harm was done to the appellant by its exposition. The Government took no part in the proceeding and urged its exclusion.

The incompetency of Taylor's accounting had been fully reviewed by the appellant's experts and all of the Taylor-Kachlein relationship had been exhaustively examined. The record fails to show any prejudice and, in fact, the appellant argues in his brief the proof vindicated Kachlein.

In the closing arguments the Court permitted counsel for the appellant one-half hour after he had made his closing argument to answer Taylor's coun-

sel's contention about Kachlein. Every consideration was given to each of the contending parties to present this immaterial phase of the case, and if the charge was unfounded, as appellant claims, it should have redounded adversely to Taylor.

The prosecution did everything possible to elminate the Kachlein-Taylor relationship but it found its way in because of the peculiar circumstances of the case. The Appellate Court should seriously consider noting this error because, if it does, the door will be opened for skillful counsel to have a "conflict" arise between co-defendants and provide an "ace in the hole" for review on appeal.

REBUTTAL WITNESSES

We shall group together the answer to the appellant's arguments relative to rebuttal witnesses. The trial of the case was lengthy, lasting from January 29 to May 14, 1954. About four hundred exhibits were received in evidence and many witnesses testified. The printed record covers six volumes, and it is incomplete. The court permitted evidence of Forster's association with Taylor from 1928 through the years of the Indictment. Seventy thousand dollars was paid by the appellant to a firm of national certified public accountants for an audit and $60 a day was paid to a certified public accountant who remained through-

out the trial at the appellant's table to assist in the defense. Three certified public accountants testified in detail as to the inaccuracies of licensed public accountant Taylor's procedures. Bankers were called, and all of the rebuttal witness except Ellis had testified at length regarding the matter. Gorans, the accountant, had reviewed the books and found irreconcilable items and had referred to Finstad and Utgard digit "1" which concerned Egeness *in extenso* (R. 527-533). The Government had objected to this evidence as it merely demonstrated some inaccuracies on Finstad and Utgard's books and the issue before the jury was the amount received from Finstad and Utgard by Forster which was unrecorded. The Government's position was that inaccuracies were beside the question. Gorans had stated that if the records of Issaquah and Alpine dairies had been properly entered they would have reflected all the income (R. 600, 799).

Taylor had stated in his cross examination by appellant's counsel that he did not make the changes on Finstad's and Utgard's books and did not know they had been changed (R. 2113) and when pressed as to who added the figures answered, "I would say Mr. Egeness" (R. 2114-2115). That this was Taylor's guess is demonstrated in his testimony (R. 2116-2117). Taylor had already been rebutted once in connection with a collateral matter and these alterations had

been charged to him by Schneider in his testimony (R. 2765).

It is to be noted that the Renton Ice and Ice Cream Company and Finstad and Utgard's books were collateral matters. These companies were sources of income which came to Forster which was not reported by him or the Issaquah Creamery Company. Long prior to the offer of the impeachment testimony three certified public accountants had explored all of Taylor's working papers and the records [which items remained in the custody of Forster and his counsel up to the time of trial]. Gorans, in chief, had for days discussed minus cash and minus inventories and had expressed his opinion that it was not possible to have such items. He carefully avoided in the seventy thousand dollar audit testimony anything about the unrecorded income in Exhibit 55, Account No. 198 — the personal savings account of Hans Forster (R. 571). He admitted that there was an account to which Forster's drawings for personal expenses could be charged (R. 591).

Throughout the trial Taylor's work had been the subject of corrections and counsel had twenty-one pages of the record about a 1932 audit, which was nearly fifteen years prior to the indictment. Taylor also gave an explanation of minus inventory (R. 2088-2089) and an explanation of minus cash. Taylor, during his examination, freely admitted the manipulation of cash

items and that they did not mean cash on hand (R. 1958-1971, 2003-2007, 2286-2290). Under cross examination he explained how he shifted accounts receivable into cash (R. 2286-2290) and that two statements issued on the same day to banks differed in cash in the sum of $8410.79 (R. 1960-1961), explaining they were for credit purposes. Taylor finally admitted to appellant's counsel that balance sheets tell "many stories" (R. 1981).

Phillip Strack, Forster's banker, testified in chief. He was called back in rebuttal to answer a question set forth on page 54 of appellant's brief. In support of the argument that he should be allowed to express an opinion, counsel refers to exhibits which were dated in 1933 and 1934 and the reading of the question propounded calls merely for an opinion and does not call for a factual answer. What Taylor meant by "cash" had been laid bare before the jury. Mr. Strack's statement that he would not have relied on a financial statement if another statement was outstanding, would be merely an expression of his opinion, and what is meant by "cash" was understandable by the jury. What was there to rebut?

Donaldson, Forster's banker, in his direct testimony discussed the financial statements for the indictment period (Ex. 121-130, R. 2677-2692) and had reviewed them with Forster and Taylor, including the

1949 statement, and identified Exhibit 134 as a statement prepared from information supplied by Forster when Taylor was not present (R. 2697). He further had testified that monthly statements were sent to Forster at Issaquah (R. 2712) and averred that Forster understood cash on hand and accounts receivable and other items (R. 2715-2716) and that the bank knew he had a savings account at Issaquah. The question addressed to Mr. Donaldson, in part reading, "What significance is there to you of the entry cash on hand and in the banks," in the light of the record means little. A jury must be presumed to know the plain import of simple English and they did not need the advice of Forster's bankers. Forster's certified public accountants had taken care of that long before and such testimony could not help Forster's defense.

The Egeness rebuttal would have added nothing to the case but confusion. It was a collateral matter about alterations on the books of Finstad and Utgard which were not pertinent. Egeness had testified in chief and the opportunity had been afforded to inquire into these matters. The court rather completely eliminated Finstad and Utgard from consideration in its final charge to the jury (R. 2656-2657), but in any event, the gist of the offense was not whether Egeness or Taylor had altered the books of Finstad and Utgard,

but whether Forster had evaded taxes and Taylor had assisted him.

The proffered rebuttal by Quentin Ellis is a unique attempt to allege error, and the assertion that knowledge on Taylor's part of Forster's savings account was a vital issue strains the imagination.

The argument in its entirety loses sight of the manipulations at Issaquah. Taylor's knowledge of it merely implicated him further in the scheme. It did not free Forster from responsibility. It would seem that the testimony of Ellis could have been put on by Forster as a part of his case but he elected not to do so, and then in the closing days of the trial desperately attempted to destroy Taylor by any means.

When counsel for the appellant cross examined Taylor and asked if Ellis was the man Taylor talked to, Taylor stated he did not recollect — it was not clear in his mind (R. 2124-25), and when further pressed, stated that he had some 35 or 30 accounts that went through the bank and it was pretty hard to single out to whom he had talked (R. 2130). All of the foregoing matters occurred on cross examination in the closing days of the trial. It was conceded it was not in rebuttal of the Government's case and Ellis was allowed, over objection of Taylor's counsel, to relate that he had discussed with Taylor the financial statements (R. 2404).

A reading of the discussion by counsel and the court (R. 2404 - 2412) should be interesting. The defense had a mystery witness which they wished to use. Taylor had not been able to identify whom he had talked to but Forster's defense produced one Ellis. His testimony could give no answer to the Government's case. It would not have helped Forster a bit, but if Taylor knew there was such an account, it would have tended to involve him further, if possible. Forster received the money and did not report it, and whether Taylor or Egeness altered the books did not mean a thing because the alterations did not affect the receipt by Forster of the funds. The court's ruling in effect closed further examination on a collateral matter which did not concern tax evasion and kept the real issue before the jury.

THE BLOCH CASE

Were it not for the decision in *Bloch v. U. S.*, 221 F. 2d 786, the appellant's points on pages 16 to 48 of the brief would be without merit. We do not propose to burden the Court with extended discussion of the *Bloch* case and its predecessors and successors. The *Bloch* case has been ably analyzed by more capable counsel and at present there is pending an *en banc* hearing in *Herzog v. U. S.* 226 F. 2d 561, in which the instructions on willfulness will be further examined. It

is sufficient to say that the *Bloch* case was decided *sua sponte;* that it ignored the previous holdings of the court and has not been followed in later decisions. Expressions of disagreement and intimations of *sub silentio* overruling it, have been observed at pages 567 and 570, *Herzog, supra.*

The instruction in the instant case has a marked distinction from the *Bloch* case in that it does not use the words "careless disregard," eliminates "negligence," and substitutes in place thereof "reckless disregard" (R. 2675), which indicates something far beyond negligence such as rashness, unrestraint, complete indifference to duty.

Reckless action supplies specific intent even in homicide cases. It becomes increasingly apparent that an individual word cannot of itself completely define the entire charge. It is not intended to, and this appears to be a parting point in the *Bloch* case.

We discuss briefly some of the appellant's citations.

In *Hargrove v. U. S.*, 67 F. 2d 820, 823, the Court made this statement:

> "A man may have no intention to violate the law and yet if he willfully and knowingly does a thing which constitutes a violation of the law he has violated the law."

U. S. v. Martell, 199 F. 2d 670, contains this statement:

> "Strangely enough, members of the jury, there is no wilfulness needed in an income tax case."

Morissette v. U. S., 342 U. S. 246, cannot give substance to the propriety of the use of willfulness because that case involved a theft of Government property which the defendant claimed was abandoned, and the Supreme Court quite properly held that the trial court was in error when it refused to permit the defense to show the defendant thought it was abandoned property and instructed the jury:

> "He had no right to take this property * * * [A]nd it is no defense to claim that it was abandoned, because it was on private property."

This Court in *Legatos v. U. S.*, 222 F. 2d 678, 685-687, observed the *Morissette* case has no standing as an authority in an evasion case for the court there instructed that intent was not an element of the offense.

In *Friedberg v. U. S.* (1954) 348 U. S. 142, the Supreme Court gave tacit approval to the *Murdock* rationale:

> "The Court instructs you that the word 'wilfully' means not only intentionally or knowingly, but done with a bad purpose * * * without justifiable excuse * * * stubbornly, obstinately, and perverse-

ly." (Instruction set forth at 53-2 U.S.T.C. par 9631)

This conviction had been affirmed in *Friedberg v. U. S.*, (6th Cir.) 207 F. 2d 777, and the Court said:

"* * * the Court delivered to the jury a clear and correct charge, in which the rights of appellant were fully protected with extreme care, * * *"

Bateman v. U. S., (9th Cir. 1954) 212 F. 2d 61 on the questioned definition, the Court said at page 70:

"As often occurs counsel has singled out one instruction in claiming error without regard to the instructions considered as a whole. The instructions on intent, given by the Court, correctly stated the law, were plain and understandable, and left no room for doubt in the minds of the jurors."

The same instruction (page 140 of its record on appeal) was given in the case of *Remmer v. U. S.*, 205 F. 2d 277, 290, and the Court said:

"* * * instructions given fully protected the rights of the appellant."

CONCLUSION

The appellee respectfully submits that the instructions were correct, the appellant was not prejudiced by any occurrence at the trial and was convicted on substantial evidence. The judgment of the court below should be sustained.

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